A **SUBRAMANIAM MUNIANDY v. LETCHUMI THASAN & ORS**

COURT OF APPEAL, PUTRAJAYA
LAU BEE LAN JCA
ABU BAKAR JAIS JCA
GUNALAN MUNIANDY JCA
B [CIVIL APPEAL NO: B-02(NCVC)(W)-1446-08-2019]
3 MARCH 2021

C ***LAND LAW:*** *Transfer – Fraud – Registered owner allegedly signed power of attorney for transfer of land to another – Whether registered owner transferred land – Whether purchaser held indefeasible title – Whether document forged – Whether transfer of land valid – Whether transfer shrouded with collusion, cheating, irregularities and fraud*

D ***LAND LAW:*** *Sale of land – Subsequent purchaser – Registered owner allegedly signed power of attorney for transfer of land to another – Purchaser sold land to subsequent purchaser using fraudulent means – Whether subsequent purchaser bona fide purchaser – Whether there was valuable consideration – Whether there was good faith in conveyance of land – Whether subsequent purchaser enjoyed indefeasibility of title to land*

E ***EVIDENCE:*** *Witness – Independent witness – Registered owner allegedly signed power of attorney for transfer of land to another – Whether registered owner transferred land – Whether there was fraud – Whether there were independent witnesses to support registered owner's contention that document was forged*

F The present appeal centered around a dispute between family members over a piece of land. The land was registered under the name of the appellant, who had gotten the same from his grandmother. A power of attorney ('POA'), allegedly signed by the appellant and attested by an advocate and solicitor cum commissioner of oaths ('third respondent'), (i) transferred the land from the appellant to his aunt ('first respondent'), for a consideration of
G RM10,000; and (ii) allowed the land to be registered under the name of the first respondent. According to the respondents, the appellant came to the third respondent's office to sign the POA in the presence of the respondents, the appellant's mother ('DW3') and brother ('DW4') and the petition writer ('DW5'). The first respondent further swore a statutory declaration ('SD'),
H before the third respondent, stating that the POA was executed before the third respondent. As the registered owner, the first respondent then transferred the land to her niece ('second respondent'), who was also the appellant's sister, after the latter claimed to have bought the same from the former. The appellant commenced an action at the High Court, against the respondents, on the basis that (i) the POA was forged and he did not sign the
I same nor agreed to the transfer of the land to the first respondent and he did not receive RM10,000 as consideration for the said transfer; and (ii) the transfer of the land was shrouded with collusion, cheating, irregularities and

fraud. At the conclusion of the trial, the trial judge found that (i) the appellant failed to prove that the POA was executed because of fraud; (ii) there were no irregularities, collusion and cheating perpetrated by the respondents; (iii) the appellant executed the POA and his signature was not forged; (iv) the POA was attested by the third respondent; (v) the transfer of the land to the first respondent was valid; (vi) it was immaterial that the appellant had the issue document of title for the land and did not part with the same; (vii) the second respondent, having paid RM150,000 to the first respondent, was a *bona fide* purchaser; and (viii) despite accepting the testimony of the legal officer ('PW1') responsible for the administration of the services of commissioners of oaths, that the third respondent must maintain written records of all his daily transactions, the trial judge opined that the absence of written records, to show the presence of the appellant, the respondents, DW3, DW4 and DW5 at the third respondent's office, did not mean the appellant did not execute the POA. Hence, the present appeal. The primary issue that arose for adjudication was whether the appellant had executed the POA or whether his signature on the POA was forged.

Held (allowing appeal with costs)
Per Abu Bakar Jais JCA delivering the judgment of the court:

(1) What was the evidence that indicated that the appellant did turn up at the third respondent's office to execute the POA? The respondents, along with DW3, DW4 and DW5, testified that they saw the appellant signing the POA. However, the respondents were interested witnesses as they are being sued in this case while DW3, DW4 and DW5 were all interested in asserting the right of the first respondent and, in subsequent to that, the second respondent, to the land. PW1, who was not connected with either the appellant or the respondents, was an independent witness who could shed some light as to the probabilities whether the appellant had indeed signed the POA or not. It was only prudent to consider PW1's testimony more favourably compared to the testimonies of the respondents, DW3, DW4 and DW5. (para 40)

(2) PW1's evidence showed that, based on the written record, (i) it was more probable that the appellant did not sign the POA before the third respondent; (ii) if there was no signature of a deponent in the register, there was no record to show that the deponent was present before the commissioner of oaths to sign that document. Since the appellant's signature was not on the register, the appellant did not appear before the third respondent to sign the POA. The evidence of PW1, as an independent witness, showed that the appellant did not meet with the first and second respondents, DW3, DW4 and DW5 before allegedly meeting the third respondent. (paras 41 & 43)

(3) The evidence of PW1 should not be taken in isolation. There was also the testimony of another independent witness, the Assistant Land Administrator of Kuala Selangor ('PW2') who gave evidence that (i) when the land was supposedly transferred, from the appellant to the first respondent, the address in Form 14A, for the transfer of land, belonged to the appellant. However, the address given in the approval letter for the transfer of the land was a different address belonging to the first respondent, and not the appellant; (ii) the Land Office received a police report together with a SD from the first respondent, stating that the issue document of title for the land had been lost. Because of this report and the SD, a new document of title was issued then and this new issue of document of title was the same as the one held by the appellant, indicating him as the owner of the land. The testimony of PW2, in this regard, supported PW1's evidence that it was probable that the appellant did not sign the POA and it also supposed the case of the appellant that he had the issue document of title with him and had never lost the same. (paras 47-49)

(4) The first and second respondents would be entitled to an indefeasible title to the land if there was no fraud or forgery involved in the acquiring of the land. However, taking note of s. 340(2)(a) of the National Land Code ('NLC'), the first respondent could not be given the right of indefeasibility to the land because she acquired the same through fraud. Applying s. 340(2)(b) of the NLC, the registration of the land in the name of the first respondent was also through a forged POA. (paras 66 & 67)

(5) There were two conditions for the second respondent, as the alleged subsequent purchaser, to satisfy for the title of the land to be indefeasible, namely by proving that: (i) there was valuable consideration; and (ii) good faith in the conveyance of the land. There was no documentary proof to show that the second respondent paid the first respondent. The second respondent also could not show conveyance of the land by the first respondent to her as she had also falsely said that the appellant executed the POA in her presence. She must have colluded with the others in saying that the appellant had signed the POA. Therefore, there could not be good faith in the conveyance of the land to the second respondent. Hence, her title to the land was also defeasible. (paras 72, 75 & 76)

(6) Evidence showed that the appellant never ceased to be the registered owner of the land. The appellant did not execute the POA and the appellant's signature on the same was forged. It would follow that the third respondent had falsely attested the POA. The appellant had discharged the burden of proof on him to prove his case that he did not sign the POA nor agreed to the transfer of the land to the first respondent

and, subsequently, to the second respondent. The land should be reverted to the appellant as the rightful and lawful owner. He must be registered as the proprietor of the land. (paras 60, 61 & 79)

Case(s) referred to:
Dato' Gopal Sri Ram v. Dato' C Vijaya Kumar & Ors [2006] 1 LNS 377 HC ***(refd)***
Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee & Anor [2012] 9 CLJ 743 HC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Low Huat Cheng & Anor v. Rozdenil Toni & Another Appeal [2017] 3 CLJ 257 FC ***(refd)***
MBf Finance Bhd v. Low Achee & Anor [2010] 1 LNS 1024 HC ***(refd)***
PP v. Ho Jin Lock & Another Case [1999] 3 CLJ 849 HC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Teoh Kim Heng v. Tan Ong Ban [2014] 8 CLJ 316 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 67, 68, 101(2), 103, 106
National Land Code, s. 340(2)(a), (b), (3)

For the appellant - Jayamurugan Vadivelu & Mohamad Saifullah; M/s Jayamurugan Vadivelu & Partners
For the respondents - AG Kalidass & Jasmin Raj; M/s K Nadarajah & Partners & Ramdhari; M/s Rama Velu & Assocs

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No. BA-22NCVC-359-06-2016 (overruled).]

Reported by Najib Tamby

JUDGMENT

Abu Bakar Jais JCA:

Introduction

[1] The dispute in this case is among family members over a piece of land. The High Court decided that the land was lawfully transferred from the appellant to the first respondent and thereafter to the second respondent. The appellant appealed against that decision of the High Court.

[2] Among others, the dispute involves an allegation that the instruments used to transfer the land are tainted with fraud and the appellant as the owner of the land had not at any point in time agreed to this transfer of the land.

Background Facts

[3] The appellant is the nephew of the first respondent. The second respondent is the sister of the appellant. The third respondent is an advocate and solicitor cum commissioner of oaths.

[4] The disputed land was at all material times, registered under the name of the appellant who got the land from his grandmother, Sinnakah a/p Bommaneikkan ("Sinnakah"). The appellant contended the land was then transferred to the first respondent (Sinnakah's daughter) without his

knowledge. Having been registered as the owner, the first respondent transferred the land to the second respondent after the latter claimed to have bought the same from the former. There is a power of attorney ("PA"), attested by the third respondent, which is heavily disputed by the appellant. It is alleged this PA was signed by the appellant in the presence of the third respondent. The appellant alleged that his signature on the PA was forged. This PA purportedly transferred the land from the appellant to the first respondent for a consideration of RM10,000. The PA also purportedly allowed the land to be registered under the name of first respondent or anyone the first respondent wishes. The PA states as follows:

> Bahawa harta ini asalnya adalah milik nenek saya dan sekarang saya serahkan semula kepada emak saudara saya iaitu yang menerima Surat Kuasa Penuh ini dengan bayaran penuh kasih sayang berjumlah RM10,000.00 sahaja dan telah saya terima sepenuhnya. Maka mulai hari ini harta ini adalah menjadi milik sepenuhnya penerima PA ini dan berhak untuknya memindahmilik harta ini kepada namanya sendiri atau pihak lain tanpa hadir saya sehingga selesai.

[5] The first respondent also swore a statutory declaration ("SD") before the third respondent. This SD stated that the PA was executed before the third respondent. These PA and SD became part of the instruments for the transfer of the land from the appellant to the first respondent and thereafter, the land was transferred from the first respondent to the second respondent after payment of RM150,000 was made by the latter.

[6] The appellant sued all the respondents on the basis that he did not at any time sign the PA or agree to the transfer of the land and he did not receive RM10,000 as consideration for the transfer of the land from the first respondent. Among others, the appellant raised the allegations of collusion, cheating, irregularities and fraud against all the respondents in respect of the transfer of the land.

The High Court's Decision

[7] The learned trial judge found that the appellant had failed to prove that the PA was executed because of fraud. Further, there were no irregularities, collusion and cheating proven by the appellant against all the respondents. The appellant failed to prove that he did not sign the PA. It was the finding of the learned trial judge that the PA was indeed executed by the appellant. The appellant's signature on the PA was not forged. The appellant had asked DW5 to prepare the PA. The appellant, the first and second respondents, DW3 (appellant's mother) and DW4 (appellant's brother) had gone to the office of DW5, a petition writer to ask DW5 to prepare the PA. After drafting the same, DW5 then brought all of them to the office of the third respondent. The PA was then signed by the appellant before the third respondent, who attested the PA. Since the PA was executed by the appellant, the transfer of the land to the first respondent was valid.

[8] The learned trial judge found that it was immaterial that the appellant had the issue document of title for the land and did not part with the same at all material times. The appellant had not given this issue document of title to anyone including the first respondent. However, as the PA was validly executed by the appellant, the learned trial judge found that it does not matter that the appellant always had the issue document of title with him. The PA meant that the land transfer to the first respondent could be done.

[9] The learned trial judge also found that subsequently, the second respondent did buy the land for RM150,000 and payment for the same was made to the first respondent. The learned trial judge found that under those circumstances, the second respondent was a *bona fide* purchaser for value. There was no need for the appellant to consent to the transfer of the land from the first respondent to the second respondent. This is because the terms of the PA had in the first place allowed for such transfer to the first respondent. Therefore, the learned trial judge found it was sufficient thereafter, only for the first respondent to apply for the transfer of the land to the second respondent.

[10] The learned trial judge also found that it is not necessary for the third respondent to show written records that the appellant, the first and second respondents, DW3, DW4 and DW5 were present in the third respondent's office for the appellant to execute the PA before the third respondent. The learned trial judge also found that the absence of such written records does not mean that the appellant did not execute the PA.

[11] The learned trial judge accepted the testimony of PW1, an independent witness who was the legal officer responsible for the administration of the services of commissioners of oaths. She testified that the third respondent as a commissioner of oaths must maintain written records of all transactions daily undertaken by the third respondent. However, the learned trial judge again found that the absence of such records does not clearly prove that the appellant did not execute the PA.

[12] Based on all the evidence adduced, the learned trial judge found that the appellant had failed to prove his case on the balance of probabilities.

Summary Of The Appellant's Contentions

[13] The appellant alleged that he had never executed the PA. The PA is false and his signature on the PA had been forged and all the respondents had committed fraud, collusion and cheating in the making of the PA.

[14] He also had the issue document of title for the land with him at all times. He did not give this document to anyone, including to the first or second respondents.

[15] The learned trial judge erred in not considering the evidence of the police that the appellant's signature on the PA had been forged. PW3, the investigation officer gave evidence that from his investigation, based on the chemist report, the signature on the PA is not the signature of the appellant, who had given his specimen handwriting to the chemist.

[16] The third respondent's commissioner of oaths register book also did not show the appellant was present when the former attested the PA. The appellant's details and signature were not recorded in this register book.

[17] The letter approving the transfer of the land was not sent to the appellant's address but to the address of the first respondent.

[18] Although the respondents said that the appellant had cheated his grandmother to get the land, none of the respondents had lodged a contemporaneous police report to this effect. The available police report lodged five years after the death of the appellant's grandmother was only regarding a misunderstanding where the respondents alleged that the appellant had refused to allow a house to be built on the land.

[19] There was also no consideration of RM10,000 recorded for the land in the memorandum of transfer. This is contrary to the case of the first respondent, who said she paid that amount to the appellant for the land without any supporting evidence.

Summary Of The First And Second Respondents' Contentions

[20] The appellant cheated his grandmother in giving the land to him. He then used a different postal address to conceal the transfer from the family members. The family members came to know of this unsavoury conduct of the appellant and after being confronted, he agreed to transfer the land to the first respondent, as she is the only surviving next of kin of the appellant's grandmother, she being the daughter of Sinnakah. The first respondent then on 29 May 2014, filed a police report against the appellant.

[21] The first respondent then agreed to transfer the land to the second respondent but lodged a private caveat on the land on 13 August 2014. On 30 October 2014, the appellant executed the PA after family members including his mother convinced him to transfer the land to the first respondent for RM10,000 as love and affection.

[22] The PA was prepared by DW5, a petition writer. It was then executed by the appellant before the third respondent, an advocate and solicitor and commissioner of oaths. It was also signed in the presence of the first respondent, the second respondent, DW3, DW4 and DW5.

[23] The appellant said that he had given the issue document of title before but the first defendant did not have the same. That is why the first respondent had to apply for a new issue document of title. The first respondent forwarded the PA to the Kuala Selangor Land Office and registered the same at Kuala Lumpur High Court on 20 November 2014.

[24] First respondent then sold the land to the second respondent for RM150,000 as valuable consideration through a valid sale and purchase agreement dated 15 September 2015. The second respondent is always a *bona fide* purchaser for value. The second respondent committed no fraud and has an indefeasible title to the land.

[25] The first and second respondents quoted s. 67 of the Evidence Act 1950 ("EA") that requires the signature of anyone on a document to be proven by the one who asserts that signature is the signature of that particular person. While s. 68 of the EA requires anyone attesting a document to testify to prove the execution of the document, if he is able to do so. Also s. 101 of the EA requires the appellant to prove that the signature on the PA is not his. And the forgery is to be proven on the balance of probabilities.

[26] The second respondent gave evidence that DW5 prepared the PA in the presence of herself, the appellant, the first respondent, DW3 and DW4. The PA was explained by DW5 to all present and DW5 then took all of them to the third respondent's office for the PA to be attested.

[27] The learned trial judge rightly found no active acts on the part of all respondents to conspire against the appellant.

[28] There is no police report made against the appellant that he had cheated his grandmother, Sinnakah to obtain the land as this a family matter and they had wanted to settle it among themselves.

[29] The failure of the third respondent to record the name of the appellant in the register book at his office, does not render the PA to be invalid. This non-recording should be a matter between the third respondent and the authority responsible for the administration of the services of the commissioners of oaths. And PW1, the legal officer responsible for the administration of the affairs of the commissioners of oaths, had testified that there had been instances that such names failed to be recorded.

[30] The first respondent had an indefeasible title to the land because the appellant agreed to the PA before she transferred the land to the second respondent. The appellant could not revoke the PA unilaterally as a donor.

[31] Sufficient consideration has been paid to the appellant for the land. The first respondent and DW3 had testified that the appellant was paid RM10,000 and the land was transferred to the first respondent also for love and affection. The PA also stated the amount of RM10,000 was paid to the appellant.

[32] Subsequently, the sale and purchase agreement between the first and second respondents indicated that RM150,000 was paid for the land by the second respondent to the first respondent. The second respondent was all material times a *bona fide* purchaser for value. She has an indefeasible title to the land.

[33] The fact that the appellant had the issue document of title with him and did not part with the same at all, should not have a bearing on this case. This is because when the first respondent asked for that document, the appellant told her that he did not have it. This compelled the first respondent to apply for a new document of title from the authority.

Summary Of The Third Respondent's Contentions

[34] The appellant, the first and the second respondents, DW3, DW4 and DW5 came to his office on 30 October 2014 for the attestation of the PA. He witnessed the appellant executing the PA and he attested the same. Before attesting the PA, the third respondent explained the terms of the PA and then asked all those present whether they understood the terms of the same. He checked the identity card of the appellant and requested him to sign the PA. He also checked the identity card of the first respondent and requested the first respondent to affix her thumbprint on the PA. He then checked the identity cards of the second respondent and DW4 and requested both of them to sign the PA. The third respondent then attested the PA. In his own words, the third respondent then certified and authenticated the PA.

[35] The evidence of the first and second respondents, DW3, DW4 and DW5 corroborated the evidence of the third respondent.

[36] With respect to the police report lodged by the appellant that there was fraud in this case, the police have been instructed that no further action (NFA) will be taken in respect of this case.

[37] The non-registration of the appellant's name in the register at the third respondent's office was a matter only between the appellant and the Registrar of the Commissioners for Oaths. It does not concern the appellant. In fact, because of this non-registration of the appellant's name, the third respondent's licence was revoked and not renewed by the said Registrar. Further, the appellant did not plead the failure of the third respondent to record his name in the register.

[38] The appellant's assertion that he did not sign the PA is a bare denial. His bare denial could not stand in view of the evidence coming from several witnesses for the respondents including independent witnesses.

Our Decision

[39] Of importance in this case is the issue whether the appellant had executed the PA or was the appellant's signature on the PA forged. This ought to be the main issue based on the facts of this case as highlighted earlier. This must also be a crucial issue, as the validity of the PA alone should be a turning point whether the appellant has proven his case.

[40] There is no dispute that as far as all the respondents are concerned, the appellant came to the third respondent's office on 30 October 2014, to sign the PA in front of all the respondents together with DW3, DW4 and DW5.

Thus, what is the evidence that is available to indicate that the appellant did turn up at the third respondent's office on that date to execute the PA? On the part of the respondents, it is said that all respondents, together with DW3, DW4 and DW5 saw the appellant signing the PA on that date. And all these witnesses are interested witnesses testifying for all the respondents. The three respondents are interested witnesses as they are being sued in this case. DW3, DW4 and DW5, are all interested in asserting the right of the first respondent and thereafter the second respondent to the land. Therefore, we had considered whether there is any independent witness on whom we could rely, on the balance of probabilities to prove that the appellant did or did not sign the PA. This independent witness should be a witness who generally will not gain or lose anything personally in the outcome of the case. We found this independent witness in PW1, who is the legal officer responsible for the administration of the affairs and services of the commissioners of oaths, like the third respondent, who unequivocally said he attested the PA after the appellant signed the same. PW1 is a Government employee not connected with either the appellant or all the respondents. She is an independent witness who could throw some light as to the probabilities whether the appellant had indeed signed the PA or not. Thus, it is only prudent for us to consider her testimony more favourably, compared to the testimonies of the three respondents, DW3, DW4 and DW5 as narrated earlier. PW1, in this regard, gave evidence as follows:

> Setelah disemak, didapati bahawa dalam buku daftar penama Subramaniam a/l Muniandy tidak wujud pada tarikh 30.10.2014 sepertimana diadukan. **Tiada rekod menunjukkan penama Subramaniam a/l Muniandy menandatangani sebarang dokumen di hadapan Sooriamoorthy a/l Nadarajah pada 30.10.2014**. Ini kerana atas keperluan undang-undang dan kewajipan bahawa setiap Pesuruhjaya Sumpah hendaklah mematuhi Kaedah 13(1), Kaedah 13(2)(a) ke (d) Kaedah-Kaedah Pesuruhjaya Sumpah 1993, semasa memberi perkhidmatannya. Beliau perlu menyemak identiti deponent, menerangkan kandungan dokumen dan mempastikan deponen menandatangani dokumen di hadapannya sebelum meletakkan meterai. Pesuruhjaya Sumpah juga perlu mempastikan merekodkan butir-butir perkhidmatan yang diberikan ke dalam buku daftar borang Kaedah 14(1) Kaedah-Kaedah Pesuruhjaya Sumpah 1993. **Sekiranya tiada tandatangan deponen dalam buku daftar, tiada rekod yang boleh mengesahkan pihak deponen hadir sendiri di hadapan Pesuruhjaya Sumpah bagi menandatangani dokumen tersebut**.
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> (emphasis added)

[41] PW1's evidence above shows that it is more probable the appellant did not sign the PA. The evidence above, based on the written record, did not indicate that the appellant had signed any document before the third respondent. As indicated in PW1's evidence above, it is a requirement of the law that the third respondent, being the commissioner of oaths, had several duties to perform in respect of anyone, (in this case the appellant) that seeks his service. And PW1, testified as above that if there is no signature of a

deponent in the register, there is no record to show that the deponent was present before the commissioner of oaths to sign that document. This would mean, since appellant's signature is not on that register, the appellant did not appear before the third respondent to sign the PA.

[42] It is also in the notes of proceedings, PW1 gave evidence that the Division of Commissioners of Oaths, Chief Registrar's Office, at the Federal Court issued a letter dated 10 April 2017 confirming that there was no record of a deponent named Subramaniam a/l Muniandy (the appellant) in the registration book for the date 30 October 2014, ie, the date on which allegedly the appellant met the third respondent to sign the PA.

[43] We are of the considered view that the evidence of PW1, as an independent witness, on the balance of probabilities showed that the appellant did not meet the third respondent to sign the PA on that date. This would also mean that the appellant did not meet with the first and second respondents, PW3, PW4 and PW5 on that date before allegedly meeting the third respondent.

[44] We are aware that the third respondent had contended that the appellant did not plead the failure of the former to record his name in the register. But we are of the considered opinion that the appellant had clearly pleaded he did not sign the PA. Thus, the fact that there was failure to record his name in the register, was still a matter well connected to the pleaded facts and also evidence to show that he had not signed the PA. After all, it is trite that evidence need not be pleaded. In the case of *Dato' Gopal Sri Ram v. Dato' C Vijaya Kumar & Ors* [2006] 1 LNS 377; [2006] 6 MLJ 328 it was held as follows:

> There are at least two reasons why the fundamental rule of pleading requires only concise facts be pleaded and not evidence. Firstly, by pleading evidence rather than a concise statement of fact, there is a likelihood of compromising the neutrality of the judge consciously or subconsciously before he hears the evidence. Secondly, a statement by a party purporting to state evidence rather than concise fact may well be erroneously assumed to be true by others, even before its truth is ascertained by a judge after assessing evidence presented.

[45] As earlier stated, we also are aware of the respondents' contention that PW1 also gave evidence, in the past, there have been instances where the names of those attending before the commissioners of oaths have been omitted or failed to be recorded in the register. But those are cases most likely not having serious repercussions compared to the case before us. Here, the appellant brought an earnest suit against all three respondents asserting and emphasising he did not at any point in time sign the PA. Thus, it does not follow, as contended by the respondents that the PA should still be considered as valid despite the non-registration of the appellant's name in the

register. And the purported error in not recording the name of the appellant by the third respondent, should not be considered as a trivial matter, having regard to other evidence that will be highlighted below.

[46] PW1 also gave evidence that the register is not merely the reference book between the third respondent and her office. She even said that an entry in the register is not merely to keep a record but in fact is required by law.

[47] This evidence of PW1 should not be taken in isolation. We have also considered the evidence of PW2, another independent witness that would support the evidence of PW1. PW2 testified as the Assistant Land Administrator of Kuala Selangor. He gave evidence that when the land was supposedly transferred from the appellant to the first respondent, the address on the Form 14A for transfer of land, belongs to the appellant. But the address given in the approval letter for the transfer of the land was a different address belonging to the first respondent and not the appellant.

[48] PW2 further testified that the land office received a police report dated 29 May 2015 together with a statutory declaration bearing the same date from the first respondent stating that the issue document of title for the land had been lost. Because of this report and statutory declaration, a new issue document of title was issued then and this new issue of document of title is the same as the one held by the appellant, indicating him as the owner of the land.

[49] The testimony of PW2 in this regard supported PW1's evidence that it is probable the appellant did not sign the PA and it also supported the case of the appellant that he, at all material times, had the issue document of title with him and had never lost the same.

[50] DW2 also gave evidence that the appellant was never informed by the land office when the police report and statutory declaration were made by the first respondent regarding the alleged loss of the issue document of title. DW2 also testified that the PA dated 30 October 2014 was produced at the same time the application was made for the replacement of the issue document of title on 29 May 2015.

[51] The evidence above would suggest that the application for the replacement of the issue document of title was improper because the appellant was not asked whether it is true that the same had been lost. The application also would most probably have been a ruse because the PA was issued on 30 October 2014 but the application for replacement was only made some seven months later, ie, on 29 May 2015.

[52] Another independent witness, PW3, the police investigating officer for this case based on the police report made by the appellant, testified that there were two chemist reports pertaining to this case. He testified with regard to the chemist reports as follows:

> Ya. Saya telah membaca laporan keputusan tersebut dan keputusan laporan mendapati bahawa tandatangan di dalam Power of Attorney tersebut besar kemungkinan (were probably not written) bukanlah tandatangan Subramaniam a/l Muniandy.
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> **Setelah saya meneliti keputusan laporan tersebut, saya dapat tahu bahawa tandatangan dalam Power of Attorney tidak ditulis (were not written by the writer of the specimen) oleh Subramaniam a/l Muniandy**.
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> (emphasis added)

[53] The above testimony from another independent witness would indicate on the balance of probabilities that the appellant did not execute and was not aware of the PA, which was used to transfer his land to the first respondent and then to the second respondent.

[54] We also could not accept the contention by the first and second respondents that the evidence of PW3 is hearsay. The evidence he obtained from his own investigation of the case includes the chemist reports. That chemist reports would constitute direct evidence based on the police investigation that has been conducted by the police themselves.

[55] This point is illustrated in the case of *PP v. Ho Jin Lock & Another Case* [1999] 3 CLJ 849; [1999] 3 MLJ 625 where Jeffrey Tan J (later FCJ) said:

> At that juncture of PW19's testimony on recall, Mr Jagdeep objected that PW19 could not say that David was not involved, as PW19 was not at the scene. **The learned DPP replied that PW19 was relating the outcome of his investigations**. In the event, the court ruled that whether David was or was not involved in the robbery cum shooting is for the court to find. **Yet what PW19 related, *albeit* PW19 was not at the scene, was not hearsay. PW19 was giving direct evidence of his investigative findings**, and not direct evidence, testimonially, that David was not involved in the robbery cum shooting. There was that clear distinction. There was never any danger, if that was Mr Jagdeep's fear, that PW19's investigative finding that David was not involved in the robbery cum shooting would supplant (just because the investigation officer had said so) the finding of the court. Accordingly, Mr Jagdeep's objection was overruled.
>
> (emphasis added)

[56] And with respect to the trial judge, there is nothing in his grounds of judgment whatsoever indicating the assessment of the evidence from the chemist reports about the alleged signature of the appellant on the PA. In fact, the trial judge did not make any findings regarding this matter. We consider this as a serious misappreciation of the evidence tendered before the trial court. After all, these chemist reports would greatly assist in determining whether the appellant did indeed execute the PA. Since there was no or insufficient judicial appreciation of this piece of evidence, we consider it justified to intervene in this case as was pointed out in the Court of Appeal case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 where it is said as follows:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[57] Even if we are wrong in rejecting the contention that the chemist reports should not be accepted because it is hearsay, the totality of the evidence that has thus far been highlighted and the other evidence that hereafter will be alluded to, would demonstrate that the appellant has proven his case on the balance of probabilities.

[58] Besides, Form 14A under the National Land Code ("NLC"), the statutory form needed for transfer of the land, in this case allegedly executed by the appellant to the first respondent is also highly suspicious. This is because the form provides for information of the amount of money paid or consideration for such transfer. But there is no such information provided in this form despite the first respondent unequivocally testifying she paid RM10,000 to the appellant for the land. This, on the balance of probabilities, is another indication that the appellant did not execute the PA or agree that the land be transferred to the first respondent. In fact, for this substantial amount, the first respondent failed to show documentary proof that this amount of RM10,000 was paid to the appellant.

[59] On the contention of the third respondent that the police have decided that no further action ("NFA") will be taken in respect of this case, we are of the view that is true for criminal prosecution. When the police have instructed that the case as NFA, it means nobody will have to face a criminal charge in court. But that does not mean in any way a civil suit is prevented from being filed. The appellant could still sue the respondents, which after all has happened in this case.

[60] Based on the reasons explained, we are of the considered view that the appellant did not execute the PA and the appellant's signature on the same was forged. It would follow that the third respondent also had falsely attested the PA.

[61] Based on what we have explained above, the appellant in our view has discharged the burden of proof on him to prove his case that he did not sign on the PA and generally agree to the transfer of land to the first respondent and thereafter to the second respondent. He has discharged this burden on the balance of probabilities and satisfied the requirement of s. 101 of the EA that states as follows:

> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[62] The appellant too, in our view, has satisfied s. 103 and s. 106 of the EA that respectively read as follows:

> 103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

[63] In this regard, our learned sister Supang Lian JC (now JCA) lucidly explains in *MBf Finance Bhd v. Low Achee & Anor* [2010] 1 LNS 1024; [2011] 7 MLJ 621 as follows:

> It is elementary that the party who asserts the existence of facts upon which judgment should be given to him must prove the existence of those facts (see s. 101, of the Evidence Act 1950). Further, s. 103 of the Evidence Act provides that unless it is provided by any law that the burden of proof of a particular fact lies with a particular person, then the burden of proof lies with the person wishing the court to believe in the existence of that particular fact.

[64] Further, with the evidence of the independent witnesses as narrated earlier, there can be no doubt that the appellant also has proven his case for fraud against all the respondents on the balance of probabilities. And this is a lower standard of proof to satisfy for the appellant compared to beyond reasonable doubt for criminal cases. The Federal Court in the case of *Sinniayah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584 has pointed out that the standard of proof, even when the claim is based on fraud for a civil case is on the balance of probabilities. It is explained as follows:

> .... there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases. **As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities**.
>
> (emphasis added)

[65] And it is also relevant to note that the appellant called fewer witnesses compared to the respondents in proving he did not execute the PA and he did not in any manner agree to transfer the land to the first and second respondents. However, what is important to appreciate is the quality of evidence being tendered and not the quantity of witnesses called in proving a case. This is well explained by Abdul Rahman Sebli J (now FCJ) in the case of *Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee & Anor* [2012] 9 CLJ 743; [2012] 4 MLJ 372 as follows:

> The fact that the plaintiff himself was his only witness to support his case is immaterial. It is an old principle that evidence is to be weighed, not counted. **The court is more concerned with the quality of the evidence,**

not the quantity. The evidence of one truthful witness weighs more than the evidence of any number of dishonest ones. This principle is embodied in s. 134 of the Evidence Act 1950 which provides as follows:

> No particular number of witnesses shall in any case be required for the proof of a fact. (emphasis added)

[66] Further, the first and second respondents would be entitled to an indefeasible title to the land only if there was no fraud or forgery involved in the acquiring of the land. The relevant statutory provision in this respect would be s. 340 of the NLC that states as follows:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) **in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or**
>
> (b) **where registration was obtained by forgery, or by means of an insufficient or void instrument; or**
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser **in good faith and for valuable consideration**, or by any person or body claiming through or under such a purchaser.
>
> (emphasis added)

[67] Taking note of s. 340(2)(a) of the NLC above, the first respondent could not be given the right of indefeasibility to the land because she acquired the same through fraud since the appellant as explained, could not have executed the PA. And applying s. 340(2)(b) of the NLC above, the registration of the land in the name of the first respondent was also through a forged PA as explained earlier.

[68] The first respondent also could not show the evidence that she paid RM10,000 to the appellant for the land. This is not a small amount. For a substantial amount like this, it would not be prudent just to rely on oral evidence from the first respondent that this amount had been paid. Since the amount is substantial, there should be documentary proof for this payment. It could be in the form of cheques or other banking documents including deposit into the bank account of the appellant. Besides, rarely would anyone carry so much cash in hand. Factually, not only there are no such documents as documentary proof, there is also not a single receipt or acknowledgment obtained by the first respondent from the appellant, if indeed it is true that such payment was made. Therefore, this is another instance disclosing fraud by the first respondent.

[69] The position of the first respondent is as a purported immediate purchaser of the land because she said she bought the land from the appellant for RM10,000. In this regard, Azahar Mohamed FCJ (now CJM) in the Federal Court case of *Low Huat Cheng & Anor v. Rozdenil Toni & Another Appeal* [2017] 3 CLJ 257, said as follows:

> On the basis of the law as we apply today, as set out by this court in *Tan Ying Hong v. Tan Sian San & Ors* (*supra*), which was subsequently followed by *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* (*supra*) and the recent decision of this court in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1, the third and fourth defendants were immediate purchasers. **As immediate purchasers of a title tainted by a forged Power of Attorney, they acquired a title that was not indefeasible**. That the third and fourth defendants were *bona fide* purchasers could not by that fact alone give a shield of indefeasibility. The defeasible title of the third and fourth defendants was still liable to be set aside ...
>
> (emphasis added)

[70] Similarly, the above decision of the apex court, is the authority that as an immediate purchaser of the land, the first respondent's title to the same is not indefeasible because the PA was forged. And that title could be set aside.

[71] In turn, the second respondent is a purported subsequent purchaser as she testified that she bought the land from the first respondent for RM150,000, after the latter purportedly bought the land from the appellant. This purported position of the second respondent is similar to the case of the appellant in *Teoh Kim Heng v. Tan Ong Ban* [2014] 8 CLJ 316, where the Court of Appeal said as follows:

> On the evidence it is clear that the appellant is a subsequent purchaser. *Being a subsequent purchaser, the appellant would obtain an indefeasible title if he could prove that he was a purchaser in good faith for valuable consideration*. This

is a statutory protection accorded by s. 340 of the National Land Code (NLC). *The burden of proving that there was a valuable consideration and good faith in the conveyance of the property lies on the appellant (see Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal [2013] 9 CLJ 577).*

(emphasis added)

[72] Based on the case above, there are clearly two conditions for a subsequent purchaser, ie, the second respondent to satisfy for the title of the land to be indefeasible. These are as follows:

(i) proving there was valuable consideration; and

(ii) proving good faith in the conveyance of the land.

[73] In fact, these conditions are stipulated in the proviso to s. 340(3) of the NLC as shown earlier.

[74] Thus, following the above case and the statutory provision stated, the second respondent has the duty to prove that she paid the first respondent RM150,000 as valuable consideration for the land and there was indeed good faith on her part in the conveyance of the land to her. Otherwise, she has no indefeasible title to the land.

[75] Of importance to be taken into account regarding the first requirement above, is the fact that RM150,000 is also not a small amount but quite a substantial amount to be handed over to the first respondent. For that amount, the second respondent said she paid the first respondent RM50,000 in cash as deposit. This is also highly unlikely because one would not normally carry that much cash around. She said she pawned her jewellery for part of this amount. However, there is no proof for this amount being paid including the pawning of her jewellery because the pawn receipts do not tally with the amount stated. There is also no proof that a receipt or any acknowledgment was issued by the first respondent to the second respondent for this substantial amount of RM50,000 as deposit. There is also no proof for the balance sum paid of RM100,000 despite the second respondent saying she borrowed from a few persons to make the payment. As stated earlier, for a substantial amount like this, we should not just rely on oral evidence, in this instance coming from the second respondent, saying such amount has been paid. There should also be documentary proof for a large amount of the balance sum. Again, regrettably, there is also no documentary proof for this payment shown by the second respondent. It is only prudent to look for documentary proof to support the mere oral evidence coming from the second respondent, saying such amount has been paid. In the absence of such documentary proof, on the balance of probabilities, it can be inferred that payment was never made by the second respondent.

[76] As seen, for the second requirement, the second respondent need to show the conveyance of the land by the first respondent to her is indeed based on good faith. It is our considered view that the second respondent could not

show this as she had also falsely said that the appellant executed the PA in her presence, with the others who purportedly came to the third respondent's office. Based on the facts of this case, she must have colluded with the others including the first and third respondents in saying that the appellant had signed the PA. Hence, there can be no good faith in the conveyance of the land to the second respondent too. Hence, her title to the land is also defeasible.

[77] In respect of the alleged payments of RM10,000 and RM150,000 by respectively the first and second respondents, it must also not be forgotten that these payments were said to be made by both of them. Therefore, based on s. 101(2) of the EA as narrated earlier, they both have the burden of proving this. However, as explained, with respect, they both have not adduced credible evidence on the balance of probabilities, to show that these payments were indeed made.

[78] The allegation that the appellant had cheated his grandmother, Sinnakah, to get the land is also not proven by the first and second respondents. This allegation is obviously very serious. But despite the serious nature of this allegation, there was no police report lodged against the appellant. The mere allegation made is not supported by any cogent evidence. The reason given that there was no police report because the first and second respondents wanted to avoid a ruckus as this is a family matter, also is on the balance of probabilities difficult to be accepted. This allegation is also contradictory to the purported fact as narrated by the first respondent that she paid RM10,000 to the appellant for the land. If it is true that the appellant had cheated his grandmother, there would be no reason for the first respondent to pay the appellant RM10,000 for the land. Besides, the learned trial judge made no finding regarding this allegation of the first and second respondents.

Conclusion

[79] Based on all the reasons aforesaid, the land should revert to the appellant as the rightful and lawful owner. He must be registered as the proprietor of the land. In fact, the evidence will show that he never ceased to be the registered owner of the land.

[80] On the whole, we are unanimous that the appellant has proven his case that he did not execute the PA and the same was forged. The facts of this case as narrated also showed that this was made possible through the fraud, collusion and cheating of all three respondents. With respect, in our considered view, the learned trial judge in dismissing the appellant's claim had come to a finding that was plainly wrong.

[81] Therefore, the appeal is allowed with costs for the appellant.